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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ~~601~~

ERIE FORGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

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IN THE

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OCTOBER TERM, 1951

No. ————

ERIE FORGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Erie Forge Company respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review a judgment of that Court entered in this case on September 28, 1951, and therefore shows as follows:

I.

A Summary Statement of the Matter Involved.

Suit was brought in the United States District Court for the Western District of Pennsylvania by the United States of America, No. 6670 Civil Action, by the filing of a complaint and the issuance of a summons on or about

August 21, 1947, claiming penalties (hereinafter for convenience sometimes referred to as "penalty") of $68,517.63 alleged to have been assessed by the Commissioner of Internal Revenue against defendant, Erie Forge Company, located at Erie, Pennsylvania, as taxpayer,* because of alleged failure to file timely excess profits returns for the years 1935 to 1940 under the provisions of the so-called Vinson Act. The defendant moved to dismiss and for summary judgment, and plaintiff cross moved.

A summary of the facts is as follows (R. 28a-34a): Shortly after March 31, 1943, defendant received a statutory notice as provided for in Section 272(a) of the Internal Revenue Code (26 U.S.C.A. Sec. 272(a)), known as the 90-day letter, which set forth a deficiency, and delinquency penalty of $17,245.22, on account of excess profits liability under the Vinson Act as aforesaid for the said years. Said 90-day letter made no claim for or reference to the additional delinquency penalty mentioned in the complaint in the amount of $68,517.63. Taxpayer petitioned the Board of Tax Appeals, now the Tax Court, for a redetermination of its entire liability for the years in question. In both the original and amended petitions filed with the Tax Court the taxpayer assigned as error, *inter alia*, and also alleged in its statement of facts, and claimed that the penalty, $68,517.63, likewise sought in the District Court action, had been erroneously asserted and was in controversy. The Commissioner's answer to the amended petition admitted that plaintiff claimed that the penalty of $68,517.63 had been erroneously asserted but denied it was in controversy before the Tax Court.

* The term "taxpayer" is used for convenience although not technically accurate as the alleged liability, if any, is imposed by the Vinson Act.

The taking of testimony was concluded in the Tax Court on March 30, 1945, and at that hearing the Tax Court advised the Commissioner's counsel as to the taxpayer's position with respect to the alleged penalty of $68,517.63. About six months thereafter, the Commissioner made a motion before the Tax Court stating that prior to the issuance of the statutory notice of deficiency he had assessed but had not included in the deficiency notice the penalty claimed in the present suit, and asked leave to amend his answer in the Tax Court proceeding and include this penalty (R. 16a; 33a).

The pertinent paragraph of the Commissioner's proposed amended answer was as follows (R. 33a-34a):

> "16. The Commissioner in his notice of deficiency herein did not include the total deficiency in penalty in the amount of $85,762.85, but computed only the additional penalty on the deficiency in excess profits liability determined in the amount of $69,613.59. The additional penalty stated in the deficiency notice is $17,245.22. The correct amount of penalty should have been stated in the deficiency notice at $85,762.85. By reason of the aforesaid facts, the Commissioner has understated the correct penalty for which the petitioner is liable in the amount of $68,517.63. The Commissioner now makes claim for the additional amount of penalty pursuant to Section 272(e) of the Revenue Act of 1934, and subsequent Revenue Acts."

The Tax Court denied the Commissioner's motion to amend for the reasons that the claim had "not been properly raised as required by the statute and the rules of this Court, and, further, because the facts upon which to base a decision of such an issue are not properly presented." Motions by the Commissioner were thereafter made to vacate the Tax Court decision and for a rehear-

ing and they were likewise denied. The Commissioner appealed from the Tax Court decision to the Circuit Court of Appeals of the United States for the Third Circuit* which affirmed, 167 F. 2d, 71 (opinion amended by order dated June 17, 1948) the decision of the Tax Court.

The Commissioner in his said appeal asked for a reversal of "the decision of the Tax Court and to have the case remanded with directions to allow an amendment to his answer to claim an increased deficiency as to the penalty" (167 F. 2d 71, 72).

The Circuit Court denied the Commissioner's prayer to reverse and remand and affirmed the decision of the Tax Court. In its decision the Court noted:

> "The Taxpayer proved that upon receipt of the notice and demand of September 9, 1941, he was advised upon inquiry by the Collector that it had been sent in error * * *." (page 73)

The Circuit Court further pointed out that the taxpayer had challenged the correctness of the 90-day letter, including the alleged penalties which are now claimed in the instant action. The Court then notes the attempt by the Commissioner to bring before the Tax Court the increased delinquency penalties:

> "Nowhere in the record or in the brief do we find any explanation of the original position or the basis for the change in the attitude of the Commissioner except that "on further consideration", apparently after reading the brief of the taxpayer, he decided the original penalties were in controversy and that he should make claim for them. His statement that the amendment conformed to the proof and that no additional proof need be offered does not meet the

* Hereinafter sometimes referred to as the Circuit Court when referring to this decision.

> burden which was upon him to prove the incorrectness of the deficiency notice and the propriety of the penalties not asserted. The proof therein was to the contrary. The evidence not objected to by the Commissioner was that the notice and demand had been sent in error. The amendment offered asserted a new issue in the nature of an affirmative claim upon which the Commissioner would have the burden of proof. (citing cases) Further, whether the amendment did conform to the proof would be a fact question for the judgment of the Tax Court under the statute. * * *, and under the doctrine of the Dobson case, * * * not for our consideration in the present state of the record." (page 73)

With respect to the Commissioner's claim that the Tax Court had not been sufficiently considerate of the Commissioner in connection with the entry by the Tax Court of its decision and submission of computations under Rule 50 of the Tax Court, the Circuit Court noted that the decision of the Tax Court was in conformity with the deficiency letter, and (at page 78) it said:

> "Certainly there was no need to wait for the submission of computations or to hear argument thereon when the exact amount of the deficiency requested by the Commissioner was allowed by the Board. His amendment obviously proposed a new issue and as the Board correctly stated the issue had not been properly raised as required by the statute and the rules of the Tax Court, and the facts upon which to base a decision of such an issue were not properly presented.
>
> "The Tax Court acted properly in not considering the Commissioner's claim to the additional penalties. Indeed in the state of the record before it, it could not rightfully have done otherwise."

The Circuit Court affirmed the decision of the Tax Court. The Commissioner did not petition this Court for a writ of

certiorari and the Tax Court's decision as affirmed by the Circuit Court became final.

With respect to the instant case which was started during the pendency of the aforesaid Commissioner's appeal from the Tax Court decision and in which the United States now seeks to recover the same amount which the Commissioner unsuccessfully sought to assert in the Tax Court proceeding, the District Court entered an order granting taxpayer's motion and denying the motion of the United States (93 F. Supp. 192). The United States appealed from the District Court's order in the present action, and the United States Court of Appeals for the Third Circuit on September 28, 1951 reversed the order of the District Court and remanded the case for further action not inconsistent with its opinion.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on September 28, 1951. By order of this Honorable Court, dated December 14, 1951, the time to file a Petition for a Writ of Certiorari was extended to and including February 23, 1952. (R. 71)

The jurisdiction of this Court is invoked under the Act of Congress of June 25, 1945 (c. 646, 62. Stat. 928; U.S.C.A. Title 28, Sec. 1254).

Question Presented

The question presented is as follows:

Whether, following the determination of a deficiency and the issuance of a statutory notice and an appeal by the taxpayer to the Tax Court, the Commissioner having failed to include in the statutory notice a portion of delinquency penalties allegedly due, and having belatedly

sought to amend his answer in the Tax Court proceeding to assert such portion of the penalties and submit the claim therefor to the determination of the Tax Court, and the Tax Court having denied the Commissioner's motions to amend, to vacate and for rehearing, such decision being affirmed by the Circuit Court of Appeals on appeal, and no petition for writ of certiorari having been presented to this Court, the Commissioner or his privy, the United States of America, may thereafter maintain a civil action at law for such additional amount of the disputed penalties; or

Whether, when the Tax Court procedure has been invoked and the Commissioner has failed to assert properly a claim before the Tax Court for a portion of the taxpayer's alleged liability, and the Tax Court denies his belated application to amend his answer and to assert his omitted claim for the determination of the Tax Court, and the decision of the Tax Court is affirmed on appeal and becomes final as above noted, he or his privy, the United States of America, may thereafter maintain an action at law against the taxpayer for the recovery of such alleged additional liability.

Specification of Errors

The errors presented for review, along with the question above, are set forth on pages 10-11, herein, and we respectfully request that the same be deemed incorporated herein.

The Reasons Relied on for the Allowance of the Writ

The Court of Appeals in its decision has decided the issues contrary to applicable Federal statutes and settled

principles of law established by the decisions of the various Federal Courts including this Honorable Court.

The decision of the Court below conflicts with established Tax Court procedure, and it is in the public interest to have the questions finally resolved by this Court.

The Court below has so far departed from the usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision.

The decision of the Court below is the first reported case permitting the Commissioner of Internal Revenue or his privy to maintain an action at law under such circumstances as to deny the finality of the Tax Court procedure.

The decision of the Court below conflicts with the accepted principles of common law with respect to the splitting of a single cause of action.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this cause, to the end that the said cause may be reviewed and determined by this Court according to law; and that your Petitioner may have such other and further relief as to this Court may seem proper and in conformity with law; and your Petitioner will ever pray.

LEO BRADY,
W. PITT GIFFORD,
Attorneys for Petitioner.

Dated: February 20, 1952.

IN THE

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OCTOBER TERM, 1951

No. ————

ERIE FORGE COMPANY,

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v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals for the Third Circuit, review of which is herewith sought, is reported in 191 F. 2d 627 (R. 61-69).

The opinion of the District Court is reported in 93 F. Supp. 192 (R. 27a-45a).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on September 28, 1951, and by order of this Honorable Court, dated December 14, 1951, the time to file a Petition for a Writ of Certiorari was extended to and including February 23, 1952.

The jurisdiction of this Court is invoked under the Act of Congress of June 25, 1945, c. 646, 62 Stat. 928; U.S.C.A. Title 28, Sec. 1254.

Statement of the Case

The material facts are set forth in the Petition for Writ of Certiorari at pages 1-6 herein.

We respectfully refer to the Memorandum Findings of Fact and Opinion of the Tax Court in *Erie Forge Company* v. *Commissioner of Internal Revenue* (Docket No. 2283), 5 T.C. 1389, and set forth in 1945 P-H T. C. Memo. Dec. par. 45,384, and in 4 TCM 1127 (CCH Dec. 14, 925 (M)), affirmed in *Commissioner* v. *Erie Forge Co.* (3 Cir.; 1948), 167 F. 2d 71, opinion amended by order dated June 17, 1948.

Statutes Involved

The statutes involved are set out in the Appendix, *infra*.

Specification of Errors

1. The Court below erred in holding that the Tax Court's decision, as affirmed by the Circuit Court, was not *res judicata* as to the instant suit to collect the additional amount of the penalties in question.

2. The Court below erred in holding that the Tax Court never assumed jurisdiction over the penalties in question.

3. The Court below erred in holding that the decision of the Tax Court, affirmed by the Circuit Court, determining taxpayer's liability for each year which included a penalty for the late filing of its return, did not bar the instant action.

4. The Court below erred in holding that the penalties in question were not deficiencies or to be treated as such under the provisions of the Internal Revenue Code or the corresponding provisions of applicable earlier revenue acts.

5. The Court below erred in holding that since the Tax Court refused to allow the Commissioner to assert a claim for the amounts of the penalties in question it thereby precluded its decision from having any effect whatsoever as to them.

6. The Court below erred in holding that the Commissioner or his privy properly proceeded in the instant action.

7. The Court below erred in allowing an indivisible and single cause of action to be split.

8. The Court below erred in not holding that the instant action constituted or resulted in a collateral attack upon the final decision of the Tax Court, as affirmed by the Circuit Court.

9. The Court below erred in its final conclusion and judgment that "for the reasons stated, the order of the District Court will be vacated, and the cause remanded for proceedings not inconsistent with this opinion."

Summary of Argument

The jurisdiction of the Tax Court when invoked by a taxpayer upon appeal from a 90-day letter is exclusive and its decision with respect to the taxpayer's entire liability for the year or period in question is final and binding upon the taxpayer and the Government.

The Commissioner may include the total delinquency penalties either in the 90-day letter or subsequently by

appropriate claim in the Tax Court proceeding. Thereafter neither the Commissioner or the United States nor the taxpayer may resort to any other court with respect to the said matters except to enforce the decision of the Tax Court.

The Tax Court had jurisdiction over the subject-matter of the instant action. Its refusal to allow the Commissioner to assert an untimely claim of the amounts of the penalties in dispute did not deprive it of the jurisdiction which was established by the Tax Court proceeding.

The penalties in question were either deficiencies or were to be treated as such, and the penalties were in fact so treated by the Commissioner, albeit belatedly.

The Court below erred in allowing suit to be maintained in a United States Federal Court, to wit the District Court for the Western District of Pennsylvania in a proceeding relating to the Vinson Act. The Commissioner of Internal Revenue and the United States of America which are in privy are bound by the representations made, the positions taken, and the determinations with respect thereto, both in the Tax Court and in the Circuit Court on the Commissioner's appeal therefrom.

The Commissioner and the United States may not maintain separate actions both in the Tax Court and in the United States District Court for the assessment or collection of portions of a single penalty. In other words one cause of action may not be split and separate suits therefor maintained in two separate forums.

The United States may not attack collaterally in the instant action the final decision of the Tax Court as affirmed by the Circuit Court.

POINT I

Jurisdiction of the Tax Court is exclusive and its decision final with respect to taxpayer's entire liability for each period in question.

A brief study of the history of the legislation relating to the organization of the Tax Court, formerly the Board of Tax Appeals, and the jurisdiction from time to time conferred upon it by Congress establishes irrefutably the fact that Congress intended to create a competent tribunal whose decisions would be final and conclusive. Its determinations bind the parties and their privies on all matters actually raised and which might have been raised affecting the taxpayer's liability for the period in question.

The harsh effects of the imposition of the tax prior to any judicial determination of liability therefor was one of the primary reasons for the creation of the Tax Court. In the beginning that body was administrative or quasi-judicial, although possessing substantial authority, but as early as 1926 Congress recognized that the status and powers of the said Board of Tax Appeals* should be enlarged and expanded.

Two important decisions of this Court, *Old Colony Trust Co.* v. *Commissioner of Internal Revenue* (1929), 279 U. S. 716, and *Dobson* v. *Commissioner* (1943), 320 U. S. 489, fully describe the powers and jurisdiction of the Board.

In the *Old Colony* case, *supra*, this Court said (pp. 726, 727):

> "* * * the decision of the Board first became final in respect to all the numerous instances which

* For convenience we shall from time to time refer to the United States Tax Court as the "Tax Court" or "Board of Tax Appeals" or "Board".

> in the course of the review may naturally end further litigation. * * * The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest * * *."

A quarter of a century later, this Court again reviewed the history and legislation of the entire subject-matter, particularly the status of the Tax Court (*Dobson* v. *Commissioner, supra*). In brief, it appears that after the 1926 Revenue Act no assessments could be made by the Commissioner, with certain exceptions not here relevant, unless specific statutory notice was formally sent to the taxpayer. The notice commonly once known as the 60-day letter and more recently as the 90-day letter represented the Commissioner's proposed determinations of the taxpayer's liability. Upon the issuance of the said statutory letter the taxpayer had two courses available. He could either pay the amount asserted in the said letter without filing an appeal to the Board and thereafter institute suit in an appropriate Federal Court for a refund; or file a petition to the Board for a review of his entire liability.

In such latter event where a petition was filed with the Tax Court all matters affecting the taxpayer's liability were in issue and he could never thereafter maintain any action in any forum, with certain exceptions not here relevant (Sec. 322 (c), I.R.C.).* The Commissioner is equally bound once the taxpayer files a petition with the Board, and the Government may not thereafter maintain any action except to enforce the decisions of the Board.

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* Since the years 1935 through 1940 are involved, the Revenue Acts of 1934, 1936 and 1938 and the Internal Revenue Code (referred to at times as I.R.C. or the Code) are applicable, and references are made to the Internal Revenue Code provisions for convenience since the relevant provisions in the Code and said Revenue Acts are substantially the same.

Chronologically we first turn our attention to the Committee Reports relating to the proposed changes in the Revenue Act of 1926. The *Senate Finance Committee Report No. 52* (69th Cong., 1st Sess.), 1939-1 C.B. (Part 2), pages 351-352, relating to the Revenue Bill of 1926 sets forth the following:

> "* * * *Finality is the end sought to be obtained by this provision of the Bill; and the Committee is convinced that to allow the reopening of the tax for the year involved, either by the taxpayer or by the Commissioner (save in the sole case of fraud), would be highly undesirable.* * * * It is the purpose of the Bill that *all questions* arising prior to the time the decision of the Board has been rendered as to the right of the Commissioner to assess and collect the tax * * * shall be determined by the Board and by the Courts on appeal from the Board. * * * Under the existing law if the Commissioner desires to collect a deficiency greater than the amount determined by the Board he may bring suit against the taxpayer in which suit the findings of the Board shall be prima facie evidence. *The House Bill takes away this right and confines the Commissioner to an appeal from the Board to the Circuit Court of Appeals and from there by certiorari to the Supreme Court. The Committee concurs in this provision.*" (Italics supplied by Court, R. 42a.)

Congress thereupon enacted legislation carrying out the above-noted recommendations. Among other things it was provided that in all cases, except for jeopardy assessments and other exceptions not here relevant, no assessments shall be made where a petition has been filed with the Board of Tax Appeals unless pursuant to the decision of the Board (Sec. 272(a), I.R.C.). It was further provided that the Board could redetermine the deficiency pro-

posed by the Commissioner and increase the same and also determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner on or before the hearing or rehearing (Sec. 272(e), I.R.C.).

Confirming what Congress did in 1926 with respect to the question of finality of decisions of the Tax Court and the binding effect thereof, we cite the *House Ways & Means Committee Report No. 2* (70th Cong., 1st Sess.), on the Revenue Bill of 1928, with respect to administrative provisions, 1939-1 C.B. (Part 2), page 404, as follows:

> "Under the 1924 Act, no appeal was had from the decision of the Board of Tax Appeals. The Government could sue for the amount of any deficiency allowed by the Board and the taxpayer could sue for the amount of any refund by the Board. In such suits the findings of fact of the Board constituted prima facie evidence. *Under the 1926 Act the decision of the Board is not the basis for court suit. If either party is dissatisfied with the decision, an appeal may be taken but a final decision in the case is binding on both the Government and the taxpayer.*" (Italics ours.)

The Courts have uniformly held that the doctrine of *res judicata* is applicable to decisions of the Tax Court even with respect to matters not presented but which might have been. A few cases illustrative of the principle are:

Commissioner v. *Sunnen* (1948), 333 U. S. 591;
Tait v. *Western Maryland Railway Co.* (1933), 289 U. S. 620;
American Woolen Co. v. *U. S.* (Ct. of Claims; 1937), 18 F. Supp. 783; aff'd on rehearing (Ct. Cl.; 1938), 21 F. Supp. 1021, cert. den. 304 U. S. 581 (1938);

Peerless Woolen Mills v. *Rose* (5 Cir.; 1928), 28 F. 2d 661;

Elbert v. *Johnson* (5 Cir.; 1947), 164 F. 2d 421;

Monjar v. *Higgins* (D. C., So. Dist., N. Y.; 1941), 39 F. Supp. 633, 637;

Continental Petroleum Co. v. *U. S.* (10 Cir.; 1936), 87 F. 2d 91, cert. den. 300 U. S. 679 (1937);

Rowan Cotton Mills Co. v. *Commissioner* (4 Cir.; 1944), 140 F. 2d 277, cert. den. 322 U. S. 740 (1944);

Mertens, Law of Federal Income Taxation, Vol. 9, p. 191;

Brooks v. *Driscoll* (3 Cir.; 1940), 114 F. 2d 426, 430;

Bankers' Reserve Life Co. v. *United States* (Ct. Cl.; 1930), 44 F. 2d 1000, cert. den. 283 U. S. 836.

In the *Bankers' Reserve* case, *supra,* the Court of Claims said (p. 1005):

> "It is manifest from the reports of committees of the Senate and the House of Representatives upon the amendments carried in the Revenue Act of 1926, to the Revenue Act of 1924, in reference to the enlarged jurisdiction and change in the procedure before the Board of Tax Appeals, that it was the purpose of Congress not only to provide for a judicial review of the decisions of the board but to make such decisions final and conclusive both as to the Government and the taxpayer."

In the case of *Elbert* v. *Johnson, supra,* the Court of Appeals for the Fifth Circuit said:

> "The decision of the Board of Tax Appeals on the appellant's petition embraced not only such

> matters as were raised on the appeal with respect to the tax, but all matters that could have been raised as affecting the validity of the tax whereof it complained."

In *Peerless Woolen Mills* v. *Rose, supra,* the Collector of Internal Revenue caused a distraint warrant to be issued, levied upon the taxpayer's property, and took steps to sell the property at public auction while an appeal of the taxpayer was pending before the Board of Tax Appeals. The taxpayer filed suit in the District Court to enjoin the Collector on the ground that the collection was prohibited by Section 274(a) of the 1926 Act while the appeal to the Board was pending. On appeal from the refusal of the District Court to enjoin the collection of the original tax, the Circuit Court of Appeals for the Fifth Circuit reversed and said:

> "We are of the opinion that it results from the statutory provisions that, while the Board has no jurisdiction where there is no deficiency assessment, yet, if there is a deficiency assessment, the jurisdiction of the Board extends to the whole controversy to the end that it may determine or redetermine the correct amount of the tax."

In *Northern Anthracite Coal Co.* (1931), 21 B.T.A. 1116, the petitioner not only brought into question the deficiency which had been asserted, but also alleged that collection of a part of the tax shown on the original return, which had been assessed within the statutory period, was barred. The Board, after pointing out that both parties had conceded that it had jurisdiction over the question, said:

> "The institution by the taxpayer of a proceeding before the Board in respect of a deficiency for any year gives the Board jurisdiction to determine not

> only the correctness of the particular amount determined as a deficiency, but also the correct tax liability and any over-payment and additional deficiency for the tax which may be involved in that determination. Because of this broad jurisdiction, the Commissioner may not collect any deficiency or unpaid assessment put in issue in the proceeding until the Board's final decision."

The Board itself has had occasion from its very inception to consider its own jurisdiction. *Gutterman Strauss* (1924), 1 B.T.A. 243. More recently in connection with the very act which has given rise to the controversy in question, the Vinson Act, the Board held that it had jurisdiction over the opposition of the Commissioner. *Foster Wheeler Corporation* (1939), 40 B.T.A. 1. In said case, the Board reviewed its expanded powers and showed that it had many functions other than considerations involved in deficiencies in income tax.

The Board has also had occasion to delineate the powers of the Commissioner which were sometimes not so broad as claimed or asserted by him. When the controversy between the taxpayer and the Commissioner was before the Tax Court (*Erie Forge Co.* v. *Commissioner,* 5 T. C. 1389) and on a review before the Circuit Court (167 F. 2d 71), it was held that the Commissioner had no right to amend his answer or to assert an increased penalty. Likewise, the Commissioner's power has been limited in other cases. *Frieda Hempel,* 1947 P-H T. C. Memo. Dec. par. 47,183; *Ross Bowman* (1951), 17 T.C.-No. 76. In the *Frieda Hempel* case, *supra,* the Commissioner's motion to increase the delinquency penalty was granted on condition that his amended answer be filed within five days. Thereafter the Commissioner filed his amended answer a few days late and the Tax Court refused to allow an increase of the penalty.

In the Tax Court proceeding between the taxpayer, *Erie Forge Company*, as petitioner therein, and the *Commissioner*, as respondent therein (5 T. C. 1389), the decision of the Tax Court became final and conclusive on both the taxpayer and the Government when it was affirmed on appeal by the Circuit Court and no petition for a writ of certiorari was filed. The claim asserted in the case at bar was neither properly asserted nor established in the Tax Court proceeding, and both the Tax Court and the Circuit Court (on the appeal from the Tax Court's decision) so held. The taxpayer assigned as error and pleaded in its petition to the Tax Court that the penalties which are now being sued for in the instant civil case had been erroneously asserted and were in controversy in the Tax Court proceeding.

Whether an assessment had been made was a question of fact in the Tax Court proceeding. Likewise, it was a question of fact whether the Commissioner had determined that an assessment should be made (*Ormsby McKnight Mitchel* (1924), 1 B.T.A. 143, 147) or whether the delinquency penalties were properly asserted at or before the hearing in the Tax Court proceeding. In the *Mitchel* case, *supra*, the Board held that an assessment made in error was not in fact or in law an assessment.

In its opinion affirming the Tax Court decision the Circuit Court stated:

> "The Commissioner's counsel's position was that whether the delinquency penalties were properly asserted was a question of fact upon which the Commissioner called for proof." (167 F. 2d 71)

What then does the same Court in its latest decision mean when it says in the instant case that "* * * the Tax Court refused to allow the Commissioner to assert a

claim. * * *" (191 F. 2d 627, 629.) The Commissioner did not submit any assessment list in the Tax Court proceeding (cf. *Western Express Co.* v. *United States* (8 Cir., 1905), 141 F. 28; *United States* v. *Bristow and others* (Cir. Ct., D. Ky., 1884), 20 F. 378). Nor was there any other proof of the making of any assessment. The statutory notice of deficiency, being part of the record before the Tax Court (*Cochran* v. *Commissioner* (3 Cir., 1947), 163 F. 2d 155), failed to make any reference to any assessment of the so-called original delinquency penalties. Accordingly, there was no presumption or proof that an assessment of the penalties had been made, and in the absence of a presumption or proof, an assessment could not be inferred in the Tax Court proceeding (cf. *Ormsby McKnight Mitchel, supra*).

Moreover, the well-settled rule that the findings of the Commissioner in his statutory notice are presumed to be prima facie correct (*Merchants' Transfer & Storage Co.* v. *Burnet* (4 Cir., 1931), 49 F. 2d 56; *Guarantee Bond & Mortgage Co.* v. *Commissioner* (6 Cir., 1930), 44 F. 2d 297; *Burnet, Commissioner* v. *Sanford & Brooks* (1931), 282 U. S. 359, does not in the instant case work against the taxpayer. The statutory notice contained no reference to the alleged assessment of any of the penalties. In fact, the Commissioner failed to prove in the Tax Court proceeding that his deficiency notice was incorrect or the propriety of the penalties now claimed by the Government in the instant case. The Tax Court so found (in the last paragraph of its memorandum of findings of fact and opinion) and the Circuit Court also so ruled (167 F. 2d 71) upon the appeal from the final decision of the Tax Court.

However, regardless of whether the issue of the amount of the delinquency penalties sued for in this action was

actually raised in the Tax Court proceeding, the doctrine of *res judicata* applies since it embraces issues which might have been raised as well as those actually raised. The Tax Court's decision became final and conclusive when it was affirmed on appeal. That decision finally denied relief to the Government in respect of the amount of the penalties sought in the instant action.

The Court below has decided (191 F. 2d 627) the issue of *res judicata* and finality of the Tax Court's decision, as affirmed, contrary to applicable Federal statutes (including Sections 1140, 1141, 272(a) (1), (b), (e), (f), and (h), and 322 (c), of the Internal Revenue Code, as amended, applicable to the fiscal years ending in 1939 and 1940, and the corresponding provisions of earlier revenue acts, commencing with the Revenue Act of 1934, applicable to the respective fiscal years ending in 1935 to 1938, inclusive, and Section 3(b) of the Act of March 27, 1934, c. 95, 48 Stat. 503, as amended, known as the "Vinson Act"), and contrary to the settled principles of law established by the decisions of this Honorable Court (in *Old Colony Trust Co.* v. *Commissioner of Internal Revenue* (1929), 279 U. S. 716; *Commissioner* v. *Sunnen* (1948), 333 U. S. 591; and *Tait* v. *Western Maryland Co.* (1933), 289 U. S. 620), and also contrary to the principles of law enunciated in the decisions of other Circuit Courts of Appeal (such as, by the Fifth Circuit Court in *Peerless Woolen Mills* v. *Rose* (1928), 28 F. 2d 661, and in *Elbert* v. *Johnson* (1947), 164 F. 2d 421, and by the Tenth Circuit Court in *Continental Petroleum Co.* v. *United States* (1936), 87 F. 2d 91, cert. den. 300 U. S. 679, and by the Fourth Circuit Court in *Rowan Cotton Mills Co.* v. *Commissioner* (1944), 140 F. 2d 277), cert. den. 322 U. S. 740, and of other Federal courts (such as by the Court of Claims in *Bankers' Reserve Life Co.* v.

United States (1930), 44 F. 2d 1000, cert. den. 283 U. S. 836, and in *American Woolen Co.* v. *United States* (1937), 18 F. Supp. 783, aff'd on rehearing, Ct. Cl., 21 F. Supp. 1021 (1938), cert. den. 304 U. S. 581, and by the United States District Court for the Southern District of New York in *Monjar* v. *Higgins* (1941), 39 F. Supp. 633). The selfsame Court below has even decided the said issue in conflict with the settled principle which it followed in its decision in *Brooks* v. *Driscoll* (1940), 114 F. 2d 426, 430. Likewise, its decision conflicts with the unequivocal and clear intent of Congress to make the decisions of the Tax Court final and conclusive under the Revenue Act of 1926 and subsequent revenue laws. (*Senate Finance Committee Report No. 52* (69th Cong., 1st Sess.), on the Revenue Bill of 1926, 1939—1 C. B. (Pt. 2), pp. 351-352; *House Ways & Means Committee Report No. 2* (70th Cong. 1st Sess.), on the Revenue Bill of 1928, 1939—1 C. B. (Pt. 2) p. 404.)

POINT II

The holding of the Court below that the Tax Court never assumed jurisdiction over the penalties in question is also in conflict with other judicial authority.

The Court below held that the Tax Court never assumed jurisdiction over the penalties in question. It is well-settled that courts can neither decline jurisdiction conferred upon them nor assume that which is not conferred (15 C. J., Section 27, p. 731).

The test of jurisdiction is the court's power to act, and the decision of questions arising in the case is an exercise of that jurisdiction. Likewise, jurisdiction depends neither on the regularity of the exercise of that power nor on the correctness or rightfulness of a decision made

in the case by the court. (21 C. J. Secundum, Secs. 26 and 27, p. 38.) Jurisdiction also carries with it the power to determine every issue or question properly arising in the case (21 C. J. Secundum, Sec. 87, p. 135).

The refusal of the Tax Court to allow the Commissioner leave to amend his answer did not constitute a failure by the Tax Court to assume jurisdiction over the penalties in question. In refusing such leave the Tax Court properly exercised its jurisdiction by asserting its power and authority over the case before it. The Circuit Court so held when it affirmed the final decision of the Tax Court.

Having unquestionably obtained jurisdiction for the years in question, the Tax Court could not lose or relinquish its jurisdiction by reason of any decision it made with respect to the facts, or the law, or both. Neither could the Tax Court be ousted from its jurisdiction by action of the Commissioner of Internal Revenue nor deprived of its right to enter a final decision with respect to the taxpayer's liability for those years. The reason for this rule is clear. A litigant in a matter before a court of competent jurisdiction who brings the other party into court is entitled to an ultimate judgment, and the opposing party can not defeat the jurisdiction of the court by a waiver or disclaimer on his part. The rule has been applied by the Tax Court in *Ross Bowman, supra,* and is aptly stated by the Honorable Court in the case of *Last Chance Min. Co.* v. *Tyler Min. Co.* (1895), 157 U. S. 683, in which it is said:

> "• • • When an action has been instituted in the court to determine such a controversy, it is not within the competency of the defendant to take himself out of court. A defendant may withdraw his answer and thus let judgment go by default, but he does not thereby deprive the court of a jurisdic-

> tion which has been once established. The rule applicable here is no different from that which applies in any other case. When a defendant has by personal service or appearance once been brought into a court, having jurisdiction of the subject-matter, he cannot at his election oust the court of jurisdiction, or prevent the case from passing to judgment. Whether he confesses plaintiff's right or default in answer, or files a denial or a disclaimer, is alike immaterial. In each and all of these cases the jurisdiction remains and the court may enter the appropriate judgment. Where the defendant simply withdraws his answer, as was this case, the court is under no obligations to inquire whether he has lost all interest but may proceed to judgment and its judgment is an adjudication of the rights of the plaintiff, as shown by the complaint and testimony. * * *"

The Court below has not cited any precedent for its holding that the Tax Court never assumed jurisdiction over the penalties in suit or the amount thereof. Such a decision of the Court below conflicts with the law established by this Court in *Last Chance Min. Co.* v. *Tyler Min. Co., supra,* and with other judicial authority as hereinabove noted.

POINT III

The delinquency penalty is a deficiency or is to be treated as a deficiency.

The legislative history of the Acts of Congress with respect to the definition of the term "deficiency" and leading up to the Tax Court procedure support the principle that a delinquency penalty constitutes a deficiency. The Revenue Act of 1918 first inaugurated a system (followed

in later laws) premised on the theory of self-assessment by the taxpayer. (*Mertens, Law of Federal Income Taxation*, Vol. 9, Secs. 49.02 and 49.06). However, additional assessments could be made under the 1918 Act without granting the taxpayer any opportunity for hearing or appeal prior to the assessment, although, as a practical matter, the taxpayer could file a claim for abatement with the Department before actual payment of the tax, the acceptance of which was discretionary with the Commissioner or Collector. Nevertheless the penalty for delinquency, under the 1918 Act, when asserted was assessed "as a deficiency in tax". (*Cheney D. Washburn* (1927), 7 B.T.A. 483, *acq. by Commissioner*, in VII-1 C. B. 33)*

The Board of Tax Appeals was thereafter created in order to give the taxpayer a forum where all matters in dispute in respect of the tax or penalties could be competently and finally determined. Its expanded powers and jurisdiction conclusively establish this fact.

The Senate Finance Committee as recently as 1944 has reported (Rep't No. 885 (78th Cong., 2d Sess.), C. B. 1944, p. 887) in connection with the definition of a deficiency as follows:

> "Under this definition (referring to 'deficiency') it was not contemplated that collection of the tax would be made before a determination of the tax liability other than in certain exceptional cases, such as those arising in connection with jeopardy assessments." (Parenthetical matter added.)

The delinquency penalty was not within the category of an exceptional case.

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* From the opinion, p. 490:

"The penalty for delinquency is assessed, collected and paid in the same manner as, and as a part of, the tax; and, therefore, when asserted, is assessed as a deficiency in tax."

Thus, Congress clearly intended a delinquency penalty to be treated as a deficiency and it granted and preserved the right of the taxpayer to appeal to the Board from any original or additional assessment or assertion of tax or delinquency penalty (regardless of whether the delinquency penalty is called an additional tax, an addition to the tax, a penalty or part of the tax).

The Commissioner has administratively treated penalties including delinquency penalties as deficiencies. That practice is evidenced by the ruling of the General Counsel of the Bureau of Internal Revenue (*G. C. M. 22, 326*, C. B. 1940-2, July-Dec., p. 159). The said General Counsel, by reason of the decision of this Court in *Helvering, Commissioner* v. *Mitchell*, 303 U. S. 391, 405, with respect to the various additions to the tax on account of all penalties, delinquency, fraud and negligence, as set forth in Supplement M, rendered the following opinion:

> "Summarizing with respect to the nature of this addition to tax, it has been held that the statute is remedial, providing compensation or indemnity for loss; that the addition to tax is to be added to the tax and collected in the same manner as the tax, or the deficiency ('and as a part of the tax', R. S. 3176); *and that the tax and penalty make a single liability, which, under common law forms of action, was recoverable in the contract action for debt.*
>
> "*It is therefore the opinion of this office that the addition to tax provided by Section 293(b)* of the Revenue Acts of 1936 and 1938 is collectible from the estate of the deceased taxpayer, A, and *should be asserted in the notice of deficiency.* This conclusion also applies to the 50 per cent addition to tax for fraud imposed by identical or similar provisions of prior Revenue Acts and the Internal Revenue Code.
>
> "*The other additions to tax included in Supplement M of the Revenue Act of 1928*, as discussed by

> the Supreme Court in the Mitchell case, corresponding sections of other Revenue Acts and of the Internal Revenue Code, *the additions to tax provided by Section 3176, Revised Statutes,* as amended, and the same section in the Code (Section 3612, I. R. C.), *fall within the same classification and principle.*" (*G. C. M. 22, 326, supra; italics ours.*)

The Commissioner has also followed the practice of issuing 90-day letters for a deficiency in delinquency penalty even though there was no disputed deficiency in tax.

> *Bouvelt Realty, Inc.* (1942), 46 B.T.A. 45;
> *Clinron Corporation* (1942), 46 B.T.A. 45.

The sole issue in the above proceedings was the correctness of the delinquency penalty imposed under Section 291 of the Revenue Act of 1936. The 90-day letter, the statutory deficiency notice, in each proceeding advised each taxpayer that the determination of his income tax liability for the year in question disclosed only a deficiency in delinquency penalty for the amount therein stated. A delinquency penalty was also proposed in the Tax Court case of *Gordon Keogh* (1950), Docket No. 27,343, deficiency letter dated December 29, 1949. How many statutory notices similar to the *Bouvelt, Clinron* and *Keogh* cases have been issued we do not know, but the fact is that the notices have been issued.

There are numerous authorities which treat the fraud penalty as a deficiency. *Herbert Eck* (1951), 16 T.C. 511; *Aaron Hirschman* (1949), 12 T.C. 1223; *Thomas H. McLaughlin* (1933), 29 B.T.A. 247; *Maitland Wilson* (1946), 7 T.C. 395. As has been noted, the fraud penalty in Section 293 of the Code and the delinquency penalty in Section 291 are companion penalties covered equally by Supplement M of Title I, Internal Revenue Code.

Further, the taxpayer should have the right to review any portion of its alleged liability whether attributable to deficiency in tax or penalty before being required to pay the same, except in the instance of jeopardy assessment and other statutory exceptions not here applicable. (*Gutterman Strauss* (1924), 1 B.T.A. 243, 248.)

The purpose of treating a penalty as a deficiency is supported by the common sense of the situation (cf. *Fred Taylor* (1937), 36 B.T.A. 427). Where the tax and penalty is in dispute, the question is one of fact in the first instance for the Tax Court's determination (*Commissioner* v. *Lane-Wells Co.* (1944), 321 U. S. 219, 224), and the amount thereof may be determined only by the Tax Court subject to review upon appeal. The delinquency penalty is to be measured by the correct tax ultimately found to be due and owing by the Tax Court.

American Milk Products Corporation v. *U. S.* (Ct. Cl.; 1930), 41 F. 2d 966;

Cullen v. *Commissioner* (5 Cir.; 1941), 118 F. 2d 651;

Plunkett v. *Commissioner* (3 Cir.; 1941), 118 F. 2d 644, affirming 41 B.T.A. 700.

Further, the only possible construction which may fairly be given to the statutes establishes conclusively that a delinquency penalty is a deficiency or to be treated as such. Section 322(c) and Section 271(a) and (b) established the equivalence or mutuality of the rights of the Commissioner on the one hand and the taxpayer on the other. Even the words used in the statutory sections support our contention. For example, Section 322(c) provides that the filing of a petition with the Tax Court bars the allowance in favor of the taxpayer of any credit or refund *in respect of the*

tax and also bars a suit by the taxpayer for *any part of such tax.* Such prohibition *in respect of the tax* includes penalties (*Tait* v. *Western Maryland Railway Co., supra; Ely & Walker Dry Goods Co.* v. *United States, infra.*) Likewise, a deficiency *in respect of the tax* which can be asserted by the Commissioner under Section 272(a) in the statutory deficiency notice, or under Section 272(c) later in the Tax Court proceedings, bars a suit by the Commissioner *in respect of the tax* which also includes penalties.

It is also respectfully submitted that the Commissioner did not proceed in the first instance to collect the amount of the penalties now in controversy in the same manner of collection for a self returned admitted tax. On the contrary, the Commissioner adopted the deficiency procedure provided by Section 272(a) I.R.C. He did not proceed by assessment and then by notice and demand followed by distraint. Neither did he attempt to collect by suit until after the Tax Court decision. While the Government alleges in the instant suit an assessment of the disputed amount of the alleged penalties, the Commissioner did not prove any such assessment in the Tax Court proceeding. The Government admitted that the notices and demand dated September 9, 1941, which the Collector sent to the taxpayer for the disputed amount of the alleged penalties were sent in error, and that collection under the notices and demands sent in July, 1944, was to be withheld pending the outcome of the Tax Court proceeding (according to the Collector's records) (R. 30a). Thus, those notices and demands were nullified by the Government acting through its Collector.

When the Commissioner made his motions in the Tax Court proceeding for leave to file an amended answer, and to vacate the Tax Court's decision as well as to reopen

the Tax Court hearing, and when he appealed from the Tax Court's decision, he admitted that the amounts of the alleged penalties now sued for were in controversy in the Tax Court proceeding. Thus, the Commissioner and his privy, the United States, admitted in effect that the disputed amount of the alleged penalties claimed in the instant case constituted or were to be treated as deficiencies for purposes of the Tax Court proceeding. The position so taken by the Commissioner in the Tax Court proceeding and on the appeal from the Tax Court's decision preclude him and the Government from denying that the penalties were deficiencies or were treated as deficiencies.

Moreover, while there is no argument that a self-returned income tax may be assessed without invoking the deficiency procedure under Section 272, I.R.C., because such a tax is admitted to be due by the taxpayer, it does not follow that a delinquency penalty which is measured by the amount of that tax *but which is disputed* by the taxpayer may be assessed without the issuance to the taxpayer of a statutory deficiency notice. It is submitted that there is no authority for assessing a delinquency penalty or any part thereof prior to the issuance of a statutory deficiency notice in a case where the taxpayer does not admit liability therefor or does not waive the restrictions on the assessment and collection thereof. Such a disputed delinquency penalty must necessarily be treated as a deficiency.

Since the instant case arose under the Vinson Act it appears that the Tax Court was designated as the only forum for the assessment of the liability including penalties inasmuch as such assessments can only be made pursuant to Title I. (See *Foster Wheeler Corporation, supra.*)

POINT IV

A single cause of action may not be split and enforced in part in one court and in part in another.

In *Western Maryland Ry. Co.* v. *United States* (D. C., D. Md.; 1938), 23 F. Supp. 554, 556, it was said:

> "It is fundamental that a single cause of action may not be split up and brought piece-meal, because, otherwise, litigation might be rendered interminable. See Stark *v.* Starr, 94 U. S. 477, 24 L. Ed. 276; Baltimore Steamship Company *v.* Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; Freeman on Judgments, 5th Ed. Sec. 596. This doctrine is equally applicable to tax cases. Guettel *v.* United States, 8 Cir., 95 F. 2d 229; International Curtis Marine Turbine Co. *v.* United States, Ct. Cl., 56 F. 2d 708."

In connection with the matter of the indivisible nature of taxes and penalties, see also *Ely & Walker Dry Goods Co.* v. *United States* (8 Cir., 1929), 34 F. 2d 429, cert. den. 281 U. S. 755; *Nelson-Wiggen Piano Co.* v. *United States* (7 Cir., 1936), 84 F. 2d 47, 48; and *Mertens, Law of Federal Income Taxation*, Vol. 10A, p. 218, and cases there cited.

> "Summarizing with respect to the nature of this addition to the tax, it has been held that the statute is remedial providing compensation or indemnity for loss; that the addition to tax is to be added to the tax and collected in the same manner as the tax or the deficiency ('and as a part of the tax', R. S. 3176); and the tax and penalty make a single liability, which, under common law forms of action, was recoverable in the contract action for debt." (G. C. M. 22326, C. B. 1940-2, July-December, p. 159.)

We do not need to repeat the facts incontrovertibly established that the decision below is contrary to the law which prevents the splitting of the single cause of action.

POINT V

The decision of the Court below permits a collateral attack upon the final decision of the Tax Court.

The Court below by its decision has erroneously permitted the Commissioner to make a collateral attack upon the final decision of the Tax Court as affirmed by the selfsame Court of Appeals. The instant case involves the same parties or their privies and the same subject matter as in the Tax Court proceeding.

Commissioner v. *Sunnen, supra;*
Tait v. *Western Maryland, supra.*

Conclusion

Apart from the foregoing, the unsoundness and error of the decision below will become apparent from the results which inevitably flow from such decision. Where a taxpayer desires to contest in the Tax Court the proposed assessment of a delinquency penalty he may be deprived of that right by the action of the Commissioner. That action may be arbitrary, whimsical or capricious; we do not know what it was in the Tax Court proceeding in this matter. The cases uniformly hold, however, that the Commissioner by his action may not deprive the taxpayer of his rights and the Tax Court of its jurisdiction. Yet, if the decision below stands, that is exactly what he has done.

From another viewpoint a fraudulent taxpayer, a no-return taxpayer, a taxpayer who has understated his

liability, and a negligent taxpayer may, of right, contest the proposed assessment in the Tax Court. However, according to the decision below, a taxpayer who merely files a late return would be denied such opportunity to justify his late filing or to have his entire liability determined. In other words, the Commissioner would decide when, to what extent and to what amount the taxpayer's liability for the year or period in question should be determined by the Tax Court. We think that the law does not give the Commissioner any such power or right.

Another inequitable result of the decision is that the taxpayer can be indefinitely denied information with respect to his total liability for a given year or period. There comes a time in the dispute between the Commissioner and the taxpayer when the Commissioner is obliged to give the taxpayer notice through the statutory notice or ninety-day letter of the taxpayer's entire liability as proposed or claimed by the Commissioner. The taxpayer being so apprised of his entire liability may then decide his course of conduct, either by payment and suit for refund or by petition to the Tax Court where his entire dispute with the Commissioner will be determined. That determination should not be limited to a part of the liability but rather to the entire liability which should be final and binding subject only to appeal and review as provided by law.

Subsequent to 1926, the Board or the Tax Court was never intended to be a forum affording the taxpayer only a partial and incomplete determination or remedy, but rather a forum where all rights and liabilities of the parties with respect to the liabilities for the period or year in question could be definitely determined. It was never intended that the taxpayer should be met years later with a civil suit to collect something which the Com-

missioner had failed to establish or assert in the Tax Court. This contention is not novel but thoroughly established. On the contrary there appears to be no reported decision supporting the Court below.

We submit that the Commissioner himself considered the Tax Court as the final tribunal in the instant cause, for, after the decision of the Tax Court, he made various attempts to get back into the Tax Court to accomplish what he had failed to accomplish in the first instance. He then obtained a review of his unsuccessful efforts below to get back into the Tax Court but was again denied that relief. In the absence of further review by a petition to this Court the case between the Commissioner and Erie Forge for the liabilities in question was finally determined, but the Commissioner, in the name of the United States of America, collaterally then and contrary to all established law moved into the District Court to obtain the relief against the same party where four times before in his direct attack he had been rebuffed.

In view of the foregoing and for the reasons herein assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

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With them on the brief,
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APPENDIX*

Act of March 27, 1934, c. 95, 48 Stat. 505 (Vinson Act) [as amended by the Act of June 25, 1936, c. 812, 49 Stat. 1926]:**

> Sec. 3. * * * *Provided*, That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—
>
> (a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.
>
> (b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices, of such contracts within the scope of this section as are completed by the particular contracting party within the income taxable year, such amount to become the property of the United States, but the surety under such contracts shall not be liable for the payment of such excess profit: *Provided*, That if there is a net loss on all such contracts or subcontracts completed by the particular contractor or subcontractor within any income-taxable year, such net loss shall be allowed as a credit in determining the excess profit, if any, for the next succeeding income-taxable year: *Provided further*, That if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under the usual methods employed under the internal-revenue laws to collect Federal income taxes: *Provided further*, That all provisions of law (including penalties) applicable with respect

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* See footnote page 14 herein.

** The Vinson Act was further amended by the Act of April 3, 1939, c. 35, 53 Stat. 560. Those amendments, however, are not material here and, accordingly, are not reproduced.

to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury * * * *And provided further,* That the income-taxable years shall be such taxable years beginning after December 31, 1935, except that the above provisos relating to the assessment, collection, payment, or refunding of excess profit to or by the Treasury shall be retroactive to March 27, 1934.

(34 U.S.C.A. 1940 ed., Sec. 496.)

* * *

Internal Revenue Code:

SUBCHAPTER C—EXCESS PROFITS ON NAVY CONTRACTS

SEC. 650. METHOD OF COLLECTION.

If the amount of profit required to be paid into the Treasury under section 3 of the Act of March 27, 1934, c. 95, 48 Stat. 505, as amended by the Act of June 25, 1936, c. 812, 49 Stat. 1926 (U.S.C.A., Supp. III, Title 34, §496), with respect to contracts completed within income-taxable years beginning after December 31, 1938, is not voluntarily paid, the Secretary shall collect the same under the usual methods employed under the internal revenue laws to collect federal income taxes.

SEC. 651. LAWS APPLICABLE.

All provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, 48 Stat. 683, and not inconsistent with section 3 of said Act of March 27, 1934, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury

as provided by section 650, and to refunds by the Treasury of overpayments of excess profits into the Treasury.

* * *

The following provisions of the Internal Revenue Code are applicable only to the fiscal years ending in 1939 and 1940. The Revenue Acts of 1934, c. 277, 47 Stat. 480; 1936, c. 690, 49 Stat. 1648, and 1938, c. 289, 52 Stat. 447, contained substantially the same provisions except where hereinafter noted.

Internal Revenue Code:

SUPPLEMENT L—ASSESSMENT AND COLLECTION OF DEFICIENCIES

SEC. 271. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

(26 U.S.C.A. 1946 ed., Sec. 271.)

* * *

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is author-

ized to send notice of such deficiency to the t
by registered mail. Within ninety days a
notice is mailed * * * the taxpayer a
petition with the Board of Tax Appeals a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) *Cross References.*—

For exceptions to the restrictions imposed by this subsection, see—

Subsection (d) of this section, relating to waivers by the taxpayer;

Subsection (f) of this section, relating to notifications of mathematical errors appearing upon the face of the return;

Section 273, relating to jeopardy assessments;

Section 274, relating to bankruptcy and receiverships; and

Section 1145, relating to assessment or collection of the amount of the deficiency determined by the Board pending court review.

(b) *Collection of Deficiency Found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but dis-

allowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

(e) *Increase of Deficiency after Notice Mailed.*—The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) *Further Deficiency Letters Restricted.*—If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Board within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subsection (e) of this section, relating to assertion of greater deficiencies before the Board, or in section 273(c), relating to the making of jeopardy assessments * * *.

(h) *Final Decisions of Board.*—For the purposes of this chapter the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1140.

(26 U.S.C.A. 1946 ed., Sec. 272.)

* * *

SUPPLEMENT M—INTEREST AND ADDITIONS TO THE TAX

SEC. 291.* FAILURE TO FILE RETURN.

In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612 (d) (1).

(26 U.S.C.A. 1946 ed., Sec. 291.)

* * *

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section 292,

* Section 291 of the Revenue Act of 1934 differed from the Code provision as set out above and from the Revenue Acts of 1936 and 1938 in that it provided for a flat penalty of twenty-five percent rather than as the Code provides for five percent for each thirty days not to exceed twenty-five percent in the aggregate.

relating to interest on deficiencies, shall not be applicable.

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

(26 U.S.C.A. 1946 ed., Sec. 293.)

* * *

SEC. 322. REFUNDS AND CREDITS.

* * *

(c) *Effect of Petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. * * *

(26 U.S.C.A. 1946 ed., Sec. 322.)

* * *

SUBCHAPTER B—COURT REVIEW OF BOARD DECISIONS

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed. * * *

(26 U.S.C.A. 1946 ed., Sec. 1140 (b)(1))

* * *

Courts of Review

Sec. 1141 [Internal Revenue Code]. (a) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U.S.C.A., Title 28, §346); and the judgment of any such court shall be final, except that it shall be subject

to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U.S.C.A., Title 28, §347).

* * *

(c) *Powers.*—

(1) *To affirm, modify, or reverse.*—Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. * * *

* * *

(26 U.S.C.A. 1948 ed., Sec. 1141 (a) and (c)(1), prior to amendment effective Sept. 1, 1948.)

* * *

CHAPTER 35—ASSESSMENT

SEC. 3640. ASSESSMENT AUTHORITY.

The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law.

* * *

SEC. 3643. OTHER LAWS APPLICABLE.

All provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings authorized and directed under this chapter.

(26 U.S.C.A. 1946 ed., Secs. 3640 and 3643.)

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994181—52——1

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 601

ERIE FORGE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 27a–45a) is reported at 93 F. Supp. 192. The opinion of the Court of Appeals (R. 61–69) is reported at 191 F. 2d 627.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1951. (R. 70.) On December 14, 1951, Mr. Justice Burton ordered that the time for filing a petition for a writ of certiorari be extended to and including February 23, 1952. (R. 71.) The petition for a writ of certiorari was filed on February 21, 1952. The jurisdiction

of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the delinquency penalty for late filing of returns, provided by Section 291 of the Internal Revenue Code and measured by the excess profits shown on the taxpayer's returns, was validly assessed without first issuing the deficiency letter for which provision is made provided by Section 272 (a) of the Code.

2. Whether the Court of Appeals correctly held that the prior proceedings for the same tax years in the Tax Court did not estop the United States in this action.

STATUTES AND OTHER AUTHORITIES INVOLVED

These will be found in Appendix A, *infra*, pp. 13–25.

STATEMENT

This case was heard in the District Court on cross motions for summary judgment and the taxpayer's motion to dismiss. (R. 6a, 8a.) The facts (R. 3a–6a) are as follows:

This is a suit by the United States against Erie Forge Company, hereinafter called the taxpayer,[1]

[1] The term "taxpayer" is used for convenience although not accurate since the alleged liability is for delinquency penalties on excess profits imposed by the Act of March 27, 1934, c. 95, 48 Stat. 503, as amended, known as the Vinson Act. But Section 3 (b) of that Act (Appendix A, *infra*, pp. 13–14) provides that all provisions of law (including penalties) "applicable with respect to the taxes imposed by

a Pennsylvania corporation, seeking judgment in the amount of $68,517.63, together with interest, representing delinquency penalties assessed against the taxpayer by the Commissioner of Internal Revenue for the years 1935 to 1940, inclusive, because of the failure of the taxpayer to timely file excess profits returns required by the Act of March 27, 1934, c. 95, 48 Stat. 503, as amended, known as the Vinson Act.[2] (R. 27a–28a.) The assessed delinquency penalties are those measured by the excess profits shown on the taxpayer's reports. (R. 4a–5a).

The taxpayer is engaged in the manufacture of steel forgings, ingots, and castings. During the years involved in this action, it kept its books of accounts and made its Federal income tax returns on the basis of fiscal years ended April 30. During the fiscal years 1935 to 1940, inclusive, the taxpayer completed contracts made by it with the Secretary of the Navy, as a result of which it was required by the Vinson Act to file annual reports of profits on those contracts and subcontracts. The taxpayer made no report of the completion of the contracts actually completed during the fiscal years 1935 to 1940, inclusive, until April 30,

---

Title I of the Revenue Act of 1934, and not inconsistent with this section" are to be applicable with respect to the assessment, collection or payment of excess profits under that Act. The parties are in agreement that this case can be treated as if it were one for the collection of liability imposed by Chapter 1 of the Internal Revenue Code. (Pet. 2.)

[2] See fn. 1, *supra*.

1941, when, for the first time, it filed with the Collector of Internal Revenue at Pittsburgh the annual reports of profits required of it under the Vinson Act. (R. 28a.)

After these reports were filed, the Commissioner of Internal Revenue assessed the excess profits liability of $307,321.19 shown on the returns, together with interest of $20,848.69, a total of $328,169.88. This assessment was paid. (R. 5a, 28a.)

Because no reports were filed for the six years in controversy until April 30, 1941, the Commissioner, on August 30, 1941, also assessed a delinquency penalty measured by the amounts shown on the returns for each of the fiscal years in the following amounts (R. 5a):

Years ended April 30	*Amount of delinquency penalty*
1935	$284.82
1936	2,171.69
1937	3,563.33
1938	12,351.74
1939	16,895.35
1940	33,250.70
Total	$68,517.63

On September 9, 1941, notice of assessments totalling $68,517.63 was given to the taxpayer and demand then made for payment. On July 21, 1944, a further demand for payment of the same penalties was made. (R. 5a, 28a–29a.) Since no part of the $68,517.63 had been paid (R. 5a), this action was commenced on August 21, 1947, which was within six years of the assessment made on August 30, 1941. (R. 1a, 5a.)

On March 31, 1943, the Commissioner notified the taxpayer of his determination of deficiencies in excess profits for the years 1935 to 1940, inclusive, of $69,613.60 and a delinquency penalty thereon of $17,245.22. (R. 8a–9a.) On June 29, 1943, taxpayer filed a petition in the Tax Court to review the deficiency determination. In both its original and amended petitions, the taxpayer claimed that the assessed penalties of $68,517.63, the subject matter of this litigation, were erroneously asserted and were in controversy. (R. 9a.) The Commissioner's answer to the amended petition admitted that the taxpayer claimed the original penalties were erroneously asserted, but denied that they were in controversy before the Tax Court. (R. 14a.) Later the Commissioner sought to amend his answer to contend alternatively (1) that the penalties assessed on the original return in the amount of $68,517.63 were in controversy as the taxpayer had contended and (2) that pursuant to Section 272 (e) of the Code the delinquency penalties on the liability shown on the reports were increased deficiencies. (R. 16a–17a.) The motion was denied by the Tax Court. (R. 26a.) The Tax Court sustained the Commissioner's determination as to the deficiencies in excess profits of $69,613.60 and the penalties thereon of $17,245.22. (R. 25a–26a, 27.) These amounts have been paid and are not here in controversy. (R. 33a.) It refused, however, to consider the assessed penalties of $68,517.63, stating

that (R. 26a) "The foregoing discussion disposes of all of the issues which were properly presented for decision in this case." The Commissioner filed a petition for review by the Court of Appeals for the Third Circuit of the decision of the Tax Court, setting forth that the Tax Court had abused its discretion in refusing to permit the Commissioner to file its amended answer and to have the assessed penalties considered as additional deficiencies. (R. 33a–34a.) The Court of Appeals for the Third Circuit sustained the Tax Court. It stated in note four of its opinion [3] (167 F. 2d 71, 73) that "There was a controversy between the parties as to whether the original penalty was a deficiency or a part of the tax; since that item was not passed upon by the Tax Court and not argued on appeal, except by reference in a footnote, we mention it only in passing."

The District Court held that the delinquency penalties measured by the liability shown on the returns were required to be asserted by a deficiency notice. Accordingly, it held that the decision of the Tax Court, affirmed by the Court of Appeals for the Third Circuit, was a final determination adverse to the Commissioner of the collectability of these penalties. (R. 45a.)

The Court of Appeals for the Third Circuit reversed the District Court and remanded for fur-

[3] The reported opinion (167 F. 2d 71) was subsequently amended by the court. The order of amendment is printed in Appendix B, *infra*, pp. 26–27.

ther proceedings not inconsistent with its opinion (R. 61–69). It held that the delinquency penalties measured by the liability shown on the returns were not required to be asserted by a deficiency notice and accordingly were collectable by assessment without regard to the deficiency procedure. It also held that the prior proceeding for these years, which began in the Tax Court and was affirmed by the Court of Appeals, was not *res judicata* as to the present penalties not there in issue. (R. 64–65.)

ARGUMENT

1. The issue dispositive of all questions raised by the petition is whether the delinquency penalty provided in Section 291 of the Internal Revenue Code (Appendix A, *infra,* pp. 16–17) for late filing of returns, when measured by the tax shown on the return (as distinguished from the same penalty when measured by a deficiency as defined in Section 271 (a) (Appendix A, *infra,* pp. 14–15)), is itself a deficiency under Section 271 (a), as taxpayer contends. If such a penalty is a deficiency, the Commissioner was required to follow one of two procedures: (1) under Section 272 (a) (1) (Appendix A, *infra,* p. 15), to include the penalty in a ninety-day letter, which he did not do (R. 63); or (2) timely ask for an increase in deficiency in the Tax Court under Section 272 (e) (Appendix A, *infra,* p. 16), an action which the Court of Appeals (167 F. 2d 71), on the Commissioner's ap-

peal from the Tax Court proceeding, conclusively decided that he had not taken. If, however, as the court below held, the particular penalty is not a deficiency, there is no question at all that the restrictions on assessment imposed by Section 272 are inapplicable and the method of collection provided by the Code (the one employed here) is by direct assessment by the Commissioner,[3a] certified to the Collector,[4] who must within ten days give notice to the taxpayer and make demand for the payment thus assessed,[5] and if the assessment is timely[6] but unpaid, final collection may be effected by distraint or by a proceeding in court within six years after the assessment.[7]

2. As indicated, the key to this dichotomy in method of collection (deficiency procedure with a right to go to the Tax Court before assessment as distinguished from direct assessment) is whether the item in question is a "deficiency." The conclusion of the court below that the delinquency penalty measured by the self-returned tax is not a deficiency is unquestionably correct and there is no conflict of decisions.

[3a] Section 3640, Internal Revenue Code. That section provides that the Commissioner is required to make "assessments of all taxes and penalties imposed by this title * * * where such taxes have not been duly paid * * * at the time and in the manner provided by law."

[4] Section 3641, Internal Revenue Code.

[5] Section 3655, Internal Revenue Code.

[6] Section 275 (a) requires assessments to be made within three years after the returns were filed.

[7] Section 276 (c), Internal Revenue Code.

The result reached below is dictated by the clearest possible statutory language. Section 291, which imposes the very penalty at issue, states that it "shall be collected at the same time and in the same manner and as a part of the tax" but if, as here, the tax has been paid before discovery of the neglect, the penalty "shall be collected in the same manner as the tax." Since the tax by which this penalty is measured was the self-returned tax, collectable as outlined above by the direct assessment procedure, it inevitably follows that the phrase "same manner" requires collection of the penalty, too, by the direct assessment method. If the penalty had been measured by a deficiency in tax, the "same manner" is of course that used to collect deficiencies. The self-evident reason for two methods of collecting the same kind of penalty is that a redetermination of the tax, be it by way of a direct assessment or a deficiency, automatically requires a redetermination of the penalty. It is, therefore, logical and administratively desirable to permit the penalty to be redetermined by the same procedural route as the tax by which it is measured.

Taxpayer's argument to the contrary (Br. 25–31) has no merit. It is based largely, if not entirely, on the failure to distinguish between penalties measured by deficiencies and the penalty here measured by the tax shown on the return.

3. Even if the statute were less clear, the correctness of the result below is fully supported by

the long and undeviating administrative practice (Mim. 3374, V–1 Cum. Bull. 118 (1926) (Appendix A, *infra,* pp. 19–20); G. C. M. 24547, Feb. 7, 1945 (Appendix A, *infra,* pp. 20–25; letter of the Commissioner of Internal Revenue dated May 23, 1951 (Appendix C, *infra,* pp. 28–29), which, on familiar principles (***Estate of Sanford*** v. ***Commissioner,*** 308 U. S. 39, 52; see also ***United States*** v. ***Jackson,*** 280 U. S. 183, 193; ***United States*** v. ***Graham,*** 110 U. S. 219, 221), is entitled to great respect. This principle is especially germane to this peculiarly administrative problem.

The fact that since the origin of the modern Tax Court procedure in 1926, no taxpayer has ever seen fit to take the position that the taxpayer has here taken, itself strongly attests the reasonableness of the administrative construction and the understanding of the bar in accordance with the result reached below. At the minimum, it requires the conclusion that no grounds for further review here have been shown to exist.

4. We are in full agreement with taxpayer's point I (Br. 13–23), that the jurisdiction of the Tax Court once invoked is exclusive and its decision final with respect to a taxpayer's entire liability for each taxable period. But it is the taxpayer and not the United States which is making the collateral attack on the Tax Court's decision. The assessments were outstanding and valid when the taxpayer filed its petition for Tax Court redetermination. That action gave the Tax Court

jurisdiction over the entire liability for the years involved. Taxpayer sought expungment of the deficiencies and abatement of the assessment. (R. 63.) It obtained neither. (R. 27 (a).) It took no appeal. The decision of the Tax Court is final and estops taxpayer with respect to the merits of the penalty. That the Tax Court erroneously, perhaps, thought the original penalties were not in issue despite taxpayer's petition placing them in issue is immaterial. Its remedy was appeal. Also irrelevant here is the Commissioner's appeal limited to testing the timeliness of his attempt to treat the penalty as an additional deficiency. This was an alternative position—at all times made clear in the Tax Court and in the Court of Appeals (R. 16a, 64)—taken out of an abundance of caution. Taxpayer has no legal or even moral standing to feel aggrieved since it is plain that an appeal by it—at all times open—would have availed it nothing in any event. This is because it lost the penalty-measured-by-the-deficiency issue on the merits, and its failure to appeal from this decision indicates that it thought that it had no case on the merits in its own estimation with respect to the penalty measured by the self assessment, inasmuch as both penalties turned on the same issue of fact. Section 291, Internal Revenue Code.

The present action by the United States which taxpayer interprets as a collateral attack on the Tax Court's decision is, on the contrary, an action

in support of that decision. Taxpayer's assumption on which its entire point I is based is that the Commissioner has the burden, in the Tax Court, of pleading and obtaining approval of outstanding assessments of a self-returned tax. (Br. 20–22.) The assumption is not only without authority but is repugnant to the entire structure provided by the Code for the collection of the tax.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

ELLIS N. SLACK,
Acting Assistant Attorney General.

LEE A. JACKSON,
IRVING I. AXELRAD,
Special Assistants to the Attorney General.

MARCH, 1952.

APPENDIX A

Act of March 27, 1934, c. 95, 48 Stat. 503 (Vinson Act) [as amended by the Act of June 25, 1936, c. 812, 49 Stat. 1926]:[8]

SEC. 3. * * * *Provided,* That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

(a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.

(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices, of such contracts within the scope of this section as are completed by the particular contracting party within the income-taxable year, such amount to become the property of the United States, but the surety under such contracts shall not be liable for the payment of such excess profit: *Provided,* That if there is a net loss on all such contracts or subcontracts completed by the particular contractor or subcontractor within any income-taxable year, such net loss shall be allowed as a credit in determining the excess profit, if any, for the next succeeding

[8] The Vinson Act was further amended by the Act of April 3, 1939, c. 35, 53 Stat. 555. Those amendments, however, are not material here and, accordingly, are not reproduced.

income-taxable year: *Provided further,* That if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under the usual methods employed under the internal-revenue laws to collect Federal income taxes: *Provided further,* That all provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury * * *: *And provided further,* That the income-taxable years shall be such taxable years beginning after December 31, 1935, except that the above provisos relating to the assessment, collection, payment, or refunding of excess profit to or by the Treasury shall be retroactive to March 27, 1934. (34 U. S. C. 1940 ed., Sec. 496.)

The following provisions of the Internal Revenue Code are applicable only to the fiscal years ending in 1939 and 1940. The Revenue Acts of 1934, c. 277, 48 Stat. 680; 1936, c. 690, 49 Stat. 1648, and 1938, c. 289, 52 Stat. 447, contained substantially the same provisions except where hereinafter noted.

Internal Revenue Code:

SUPPLEMENT L—ASSESSMENT AND COLLECTION OF DEFICIENCIES

SEC. 271. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which

the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.[9]

* * * * *

(26 U. S. C. 1946 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board

[9] Section 271, as here set out, is the section as amended in 1944, 53 Stat. 82. That amendment is applicable only to years beginning after 1942. The provision that is here strictly applicable is found at 52 Stat. 534 but, for present purposes, there is no substantial difference between the two versions.

has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(e) *Increase of Deficiency After Notice Mailed.*—The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

* * * * *

(26 U. S. C. 1946 ed., Sec. 272.)

SUPPLEMENT M—INTEREST AND ADDITIONS TO THE TAX

SEC. 291.[10] FAILURE TO FILE RETURN.

In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per

[10] Section 291 of the Revenue Act of 1934 differed from the Code provision as set out above and from the Revenue Acts of 1936 and 1938 in that it provided for a flat penalty of twenty-five percent rather than as the Code provides for five percent for each thirty days not to exceed twenty-five percent in the aggregate.

centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612 (d) (1).

(26 U. S. C. 1946 ed., Sec. 291.)

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax * * *

(26 U. S. C. 1946 ed., Sec. 292.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section

292, relating to interest on deficiencies, shall not be applicable.

(*b*) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U. S. C. 1946 ed., Sec. 293.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NON-PAYMENT.

(a) *Tax Shown on Return.*—

(1) *General Rule.*—Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 294.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 322.)

V-1 Cum. Bull. 118:

SECTIONS 273 AND 274.—DEFICIENCY IN TAX.

Article 1231: Deficiency defined. V-5-2569
(Also Section 276, Article 1261) Mim. 3374

Revenue Act of 1924.

Tax on amended and delinquent returns not a deficiency.

TREASURY DEPARTMENT

OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., January 18, 1926.

To Collectors of Internal Revenue
and Others Concerned:

Your attention is invited to the definition of a deficiency in tax as set forth in section 273 of the Revenue Act of 1924.

It is held that the tax disclosed on an amended or delinquent return signed by a taxpayer does not constitute a deficiency within the meaning of section 273 of the 1924 Act. This is true, even though the amended or delinquent return was prepared by a collector or deputy collector, so long as it is signed by the taxpayer. It is further held that the 25 percent penalty added to the tax reported by the taxpayer on a delinquent return is not a deficiency within the meaning of the 1924 Act. Accordingly, 60-day letters should not be sent out in any of these cases.

* * * * *

C. R. NASH,
Acting Commissioner.

General Counsel's Memorandum 24547:[10]
Feb. 7, 1945

GC:I:OPV:TAS
A–396676

In re Additions to Tax for Failure to File Declaration of Estimated Tax Constitute Deficiencies

DEPUTY COMMISSIONER CANN:

Attention: Mr. Charles P. Suman, Head, Practice and Procedure Division

Reference is made to your memorandum (IT:P:XR VPC) dated December 23, 1944, with respect to whether the additions to the tax imposed on account of delinquency in payment or underestimation of estimated tax by Section 294 (d) of the Internal Revenue Code, as amended,

[10] This memorandum has not been printed in the Cumulative Bulletin.

constitute deficiencies within the meaning of Section 271 of the Code, as amended:

> In this connection you state:
>
> "In Mim. 3374 (C. B. V–1, 118 (1926)) it was held that the 25 per cent penalty added to the tax reported by a taxpayer on a delinquent return is not a deficiency. Consistent with that position, it has been the administrative practice of the Income Tax Unit to treat the delinquency penalty with respect to the tax reported by the taxpayer as not constituting a deficiency, but in the event the tax reported by the taxpayer is increased, the increase in penalty attributable to the increase in tax is treated as a deficiency.
>
> "This statement is made since you may wish to consider the provisions of section 291 of the Code (relating to additions to the tax for failure to file a timely return) in reaching a conclusion as to whether the additions to the tax provided in section 294 (d) are comparable. In other words, are the additions to the tax provided in section 294 (d) applicable to the tax reported by the taxpayer to be regarded as not deficiencies but any increase in such additions due to increasing the tax liability reported by the taxpayer to be regarded as deficiencies?"

Section 59 (d) of the Internal Revenue Code, as added by Section 13 (a) of the Individual Income Tax Act of 1944, declares that payment of the estimated tax shall be considered payment on account "of the tax for the taxable year," and that "Assessment in respect of the estimated tax *shall be limited to the amount paid.*" (Italics supplied.) Hence, any liability incurred by a

taxpayer under Section 294 (d) on account of delinquency with respect to the estimated tax, but which has not been paid, may not be assessed as a part of the estimated tax. If it is assessable at all, it must be assessed as a part of the tax imposed for the taxable year.

It will be noted that Sections 291, 292 and 293 of the Code deal respectively—

> (1) with addition to the tax for "failure to file returns", which addition is required to be "collected at the same time and in the same manner and as a part of the tax;"
>
> (2) with "interest on deficiencies", which interest is required to "be assessed at the same time as the deficiency;" and
>
> (3) with addition to a deficiency, which addition is required to "be assessed, collected, and paid in the same manner as if it were a deficiency."

Thus it will be seen that these sections prescribe in what manner the additions or interest referred to shall be assessed or collected. However, the ensuing Section 294 (d), *supra,* which relates to the additions imposed for delinquency in filing a declaration and making payment, or for substantial underestimation, of estimated tax, merely declares that such additions "shall be added to the tax." The statute stops there without providing when or in what manner such additions shall be assessed or collected. That the amount thereof may not be assessed or collected as a part of the estimated tax is clear from the specific provisions already noted, since assessment of the estimated tax is limited to the amount paid. The procedure to be followed, therefore, must be determined from such other signposts as may appear in the

context of that section, its general setting, and other provisions with which it is in *para materia.*

Section 294 bears the heading, "ADDITIONS TO THE TAX IN CASE OF NONPAYMENT." This heading would indicate that the section deals with amounts required to be added by the collector at the time of collection. The first subdivision (a) deals with amounts determined to be due by the taxpayer "as the tax imposed" by the Act, and provides that the addition therein referred to for failure to make timely payment "shall be collected as a part of the tax." The next subdivision deals with deficiencies or any additional amounts assessed in connection therewith and provides that if such amounts are not timely paid "there shall be collected as part of the tax, interest * * * from the date of such notice and demand" by the collector. Subdivision (c) merely provides that the provisions of subdivision (b) shall not be applicable to the class of cases therein referred to. Accordingly these subdivisions seem to fit in with the language contained in the heading and apparently contemplate that the additions referred to will be included in the notice and demand by the collector at the time of collection.

It is believed that a similar procedure may be followed with respect to the additions to the tax imposed by paragraphs (1) (A) and (1) (B) of subdivision (d) since such additions are also imposed for failure to make timely payment. The amount of the addition in each instance is 5 per centum of each installment due but unpaid, plus 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof

during which such amount remains unpaid. The maximum amount of the addition, however, may not exceed "10 per centum of the unpaid portion of such installment." Such additions may be included in the collector's notice and demand of original tax and upon the assessment thereof may be collected by distraint if necessary in the same manner as the additions to the tax imposed by subdivisions (a) and (b) of Section 294. Similarly, paragraph (d) (2) of the same section deals with additions to the tax to be collected because of substantial underestimation of the estimated tax, which estimation is required to be made solely for advance payment purposes. Accordingly, this addition too may be regarded as having been imposed for failure to make timely payment through underestimation. Hence it can be argued that this addition, consistent with the language of the heading of Section 294, is also imposed for nonpayment and that the statute contemplates that the amount thereof should be added by the collector at the time of collection. Of course, if any deficiency is later asserted, any increase in the additions to the tax should also be included in the deficiency notice.

However, it should be remembered that any such additions, although measured by the amount of the tax imposed, represent additions for delinquency or underestimation of the estimated tax and accordingly they are subject to the limitations contained in section 294 (d). *Cf.* G. C. M. 24435, in re Commerce Clearing House, Inc. (December 18, 1944).

The conclusions herein outlined are substantially in accordance with the conclusions reached

at a conference held in this office January 29, 1945, which was attended by representatives of your Unit and the Accounts and Collections Unit.

Accordingly, it appears that you may adopt substantially the same procedure with respect to the instant additions to the tax that you now follow with respect to the delinquency penalty imposed by Section 291 of the Code, as amended, and to which reference is made in paragraphs 2 and 3 of your memorandum.

Signed J. P. Wenchel,
R. H. D.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT—October Term, 1946

No. 9177

COMMISSIONER OF INTERNAL REVENUE, Petitioner

v.

ERIE FORGE COMPANY, Respondent

Present: GOODRICH and MCLAUGHLIN, *Circuit Judges,* and MURPHY, *District Judge.*

ORDER

AND NOW, to-wit, this 17th day of June, 1948, it is ordered that the opinion filed on March 9, 1948 in the above entitled case be and the same hereby is amended by striking out the first sentence on page 4, which reads, "The answer admitted the original penalties were erroneously asserted and denied that they were in controversy.", and by substituting in lieu thereof the following sentence: "The answer admitted that the taxpayer claimed that the original penalties were erroneously asserted and denied that they were in controversy." It is further ordered that the opinion filed on March 9, 1948, in the above entitled case be and the same hereby is amended by striking out the first sentence of the paragraph which begins on page 5 and reads: "The question for decision is, therefore, where abundant notice has been given to Commissioner's counsel that the notice of deficiency does not include penalties

previously assessed and instead of moving to amend and extend his claim, he admits they were erroneously assessed and insists that the burden of proving the penalties not included were properly asserted is upon the taxpayer, did the Tax Court abuse its discretion in denying leave to amend the answer when the request is first made after the testimony has been concluded and the taxpayer's brief pointing to Commissioner's error has been served upon him, and the only reason given for the delay is that the Commissioner upon further consideration decided the original penalties were in controversy and should be included?", and by substituting in lieu thereof the following sentence: "The question for decision is, therefore, where abundant notice has been given to Commissioner's counsel that the notice of deficiency does not include penalties previously assessed and instead of moving to amend and extend his claim, he insists that the burden of proving the penalties not included were properly asserted is upon the taxpayer, did the Tax Court abuse its discretion in denying leave to amend the answer when the request is first made after the testimony has been concluded and the taxpayer's brief pointing to Commissioner's error has been served upon him, and the only reason given for the delay is that the Commissioner upon further consideration decided the original penalties were in controversy and should be included?"

By the Court, HERBERT F. GOODRICH, *Circuit Judge.*

A true copy: Teste: *Clerk of the United States Circuit Court of Appeals for the Third Circuit.*

APPENDIX C

MAY 23, 1951

Hon. J. HOWARD MCGRATH,
Attorney General,
Department of Justice,
Washington 25, D. C.

In re: *United States* v. *Erie Forge Company*

MY DEAR MR. ATTORNEY GENERAL: The issue presented in the above-entitled case now pending in the United States Circuit Court of Appeals for the Third Circuit is whether a delinquency penalty imposed by Section 291 of the Internal Revenue Code for late filing of returns and measured by the excess profits shown on the returns, may be assessed and collected without the issuance of a deficiency letter.

In view of the provisions of Section 291 of the Internal Revenue Code and of the provisions of the Revenue Acts antecedent thereto, it has been the position of the Bureau, where a delinquent return is filed reporting a tax and where there is no reasonable cause for late filing, that a penalty measured by the tax reported may be assessed and collected without the issuance of a deficiency letter.

In this connection see Mim. 3374, Cum. Bull. V–1, page 118, which provides, inter alia:

> It is held that the tax disclosed on an amended or delinquent return signed by a taxpayer does not constitute a deficiency within the meaning of section 273 of the

1924 Act. This is true, even though the amended or delinquent return was prepared by a collector or deputy collector, so long as it is signed by the taxpayer. It is further held that the 25 per cent penalty added to the tax reported by the taxpayer on a delinquent return is not a deficiency within the meaning of the 1924 Act. Accordingly, 60-day letters should not be sent out in any of these cases.

This mimeograph, so far as it related to amended returns, was revoked by Mimeograph 3428 dated May 24, 1926, Cum. Bull. V–1, page 119. However, the provision with reference to penalties on delinquent returns has been extant through the years and has not been modified.

So far as I have been able to ascertain there has been no authorized departure from this position in the actual practice of the Bureau.

Very truly yours,

(Signed) GEO. J. SCHOENEMAN,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1932

Office - Supreme Court, U. S.
FILED
APR 5 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 601

ERIE FORGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 601

ERIE FORGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

Petitioner, for reply, respectfully calls to the attention of this Honorable Court certain statements in the opposing brief which appear to be misstatements or erroneous conclusions.

The opposing brief, at the bottom of page 9 and on page 10, sets forth a "long and undeviating administrative practice" and in support thereof cites a mimeograph opinion which has been reversed at least in part, an unpublished opinion of the Commissioner and a recent letter from the Commissioner to the Attorney General gratuitously handed up to the Court of Appeals below in the course of the argument on the appeal. It is interesting to note that the said letter (opposing br. p. 29) refers to the alleged practice of the Bureau and points out that there has been no "authorized" departure therefrom. In our main brief we pointed out that a contrary administrative practice existed (pp. 27-30).

The Government also states at the top of page 11 of its brief that the taxpayer sought "expungement of the deficiencies and abatement of the assessment." This is not only a misstatement of fact but a complete distortion of the entire proceeding. The Court will note the odd treatment of this point on pages 5 and 11 of the opposing brief. The fact is that the Tax Court found that the sum total of the taxpayer's liability for the period in question did not include that portion of the delinquency penalty which petitioner claimed in its Tax Court proceeding had been erroneously assessed and for which this instant action is instituted.

On page 11 it is argued that Petitioner knew its case was not meritorious because it did not appeal from the Tax Court's decision. This conjecture is as untrue and unsound as various other statements and conclusions in the opposing brief. The fact of the matter is that the decision of the Tax Court was final and conclusive as to the Petitioner's entire tax liability for the period in question and taxpayer did not see fit to appeal from a decision which, in its opinion, represented an excessive amount but still less than might have been imposed. Specifically, as regards the penalty the amount determined as the final liability was approximately one-fifth of the amount of potential liability.

Again we respectfully submit that the case justifies the issuance of a writ of certiorari.

Respectfully submitted,

LEO BRADY,
W. PITT GIFFORD,
Attorneys for Petitioner.

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FILED
MAY 15 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

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No. 601

ERIE FORGE COMPANY,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 601

ERIE FORGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of April 21, 1952, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in the above entitled case as prayed for in the petition filed February 21, 1952, herein.

Reasons for Granting Rehearing and Issuing the Writ

The net effect of the instant case to date is the creation of a preferred standard for the sovereign in tax controversies—the government may subsequently relitigate in the Federal Court the same claim previously in controversy before the Tax Court, while the taxpayer, however, is confined solely to the Tax Court.

With all due deference we submit that not only is such a result specifically contrary to the law as enacted by Congress and determined by the courts but is likewise contrary to the entire spirit of the law. Certainly the taxpayer may not institute or prosecute an action in the Federal Court for any tax year after having resorted to the Tax Court. Apart from the doctrine of *res judicata* it has been held that the taxpayer is precluded from resorting to any other forum inasmuch as the Tax Court is the exclusive forum for the determination of every matter of tax liability relating to the year in question—whether litigated or not. "It is not the decision which the Tax Court makes but the fact that the taxpayer has resorted to that court which ends his opportunity to litigate in the District Court his tax liability for the year in question. * * * Its decision determined finally, unless reversed upon appeal, the amount of the plaintiffs' 1938 income tax." *Elbert* v. *Johnson*, 164 F. 2d 421, 424 (2 Cir., 1947). The Court further stated that it was immaterial whether the issue sought to be litigated was presented or not, or even could not have been presented.

Indeed, in the *Elbert* case the Tax Court had held that it had no jurisdiction to determine the matter concerning which the suit in the District Court was later brought. In other words the rule limiting the taxpayer to the Tax Court was sharply invoked even though the Federal Court action seemed meritorious. In the case at bar, however, the Court below admitted that the Tax Court had jurisdiction but stated that it had not exercised the same.

Before proceeding further with the authorities it is important to inquire into the status of the instant case. The Court below vacated the order of the District Court dismissing the action and remanded the cause for proceedings not inconsistent with its opinion. In its opinion, however,

the Court of Appeals held that the Tax Court decision was not *res judicata*. Is that the law of the case and is the taxpayer deprived of his right to assert and prove that the penalty was in fact as well as in law adjudicated by the Tax Court? In the light of the government's stand to date it appears that it will urge that not only has the taxpayer lost such right but the government itself may invoke the doctrine of *res judicata* by claiming that the determination of the Tax Court with respect to the delinquency penalty was a decision against the taxpayer on the merits as to that portion of the penalty on which the instant District Court action has been brought. It is apparent therefore that further involved litigation will ensue because there has been denied that finality to the determination of the Tax Court which from its inception its decisions have been accorded.

In our main brief we set forth only a portion of the Senate Finance Committee report relating to the finality of the Tax Court and omitted therefrom certain portions which perhaps may be helpful in further considering the matter:

> "Under the existing law, after the Commissioner has determined the deficiency and mailed notice thereof to the taxpayer, the taxpayer may appeal to the Board of Tax Appeals; but if the Board finds that there is a deficiency, the taxpayer must pay the tax and proceed before the Department and the Courts for a refund. The House Bill institutes a system of appeals from the decisions of the Board to the Circuit Courts of Appeals and from there on certiorari to the Supreme Court. The House Bill also provides in Section 281(d) that when the deficiency letter has been sent to the taxpayer, whether or not he takes the case to the Board of Tax Appeals, his right to sue for a refund for the year to which the deficiency letter relates is forever

barred. This provision seems to the Committee too drastic, and it is accordingly proposed in Section 284(d) of the Bill that the taxpayer's right to claim and sue for a refund shall be barred only if he takes the case to the Board, thus preserving to him the option of paying the tax and then proceeding before the Department and the Courts to recover any excess payments by a claim or suit for refund.

"But if he does elect to file a petition with the Board, his entire tax liability for the year in question (except in case of fraud) is finally and completely settled by the decision of the Board when it has become final, whether the decision is by finding of facts and opinion or by dismissal, as in the case of lack of prosecution, insufficiency of evidence to sustain the petition, or on the taxpayer's own motion. *The duty of the Commissioner to assess the deficiency thus determined is mandatory;* and no matter how meritorious a claim for abatement of the assessment or for refund, he cannot entertain it, nor can suit be maintained against the United States or the Collector. *Finality is the end sought to be obtained by these provisions of the Bill; and the Committee is convinced that to allow the reopening of the tax for the year involved, either by the taxpayer or by the Commissioner (save in the sole case of fraud), would be highly undesirable.* * * * *It is the purpose of the Bill that all questions arising prior to the time the decision of the Board has been rendered as to the right of the Commissioner to assess and collect the tax,* including the question as to whether or not the statute of limitations has run before the mailing of the deficiency letter, *shall be determined by the Board and by the Courts on appeal from the Board.* * * * Under the existing law, if the Commissioner decides to collect a deficiency greater than the amount determined by the Board, he may bring suit against the taxpayer, in which suit the findings of

> the Board shall be *prima facie* evidence. *The House Bill takes away this right and confines the Commissioner to an appeal from the Board to the Circuit Court of Appeals, and from there by certiorari to the Supreme Court. The Committee concurs in this provision.*" (Italics ours.)

Senate Finance Committee Report No. 52 (69th Cong., 1st Sess.) on the Revenue Bill of 1926, 1939—1 C. B. (Part 2), pp. 351-352.

The Courts have consistently upheld the Congressional policy as set forth in the above quoted report.

In the case of *Guettel* v. *U. S.*, 95 F. 2d 229 (8 Cir., 1938), *cert. den.*, 305 U. S. 603, 59 S. Ct. 64, after citing various decisions of this Honorable Court it was held that claims could not be split and prosecuted piece-meal, that the rule of *res judicata* applied to tax cases to the same extent as other cases, and that even though the claim sought to be advanced in the second action had not been urged in the court below, the rule of *res judicata* was nonetheless applicable. At page 232:

> "The rule of res judicata is based upon that public policy which requires that a single controversy which is capable of being completely determined in one suit shall be ended by the judgment in that suit, and shall not become the subject matter of subsequent litigation. See *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, 48, 18 S. Ct. 18, 42 L. Ed. 355. '*The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law-making body rather than the courts.*' *Tait* v. *Western Maryland Ry. Co.*, supra, 289 U. S. 620, 624, 53 S. Ct. 706, 707, 77 L. Ed. 1405." * * * (Italics ours.)

> "'To hold, therefore, that the conclusive effect of a judgment either as an estoppel or as a merger or bar may be escaped by showing even justifiable ignorance of the existence of facts or evidence which might otherwise have been presented, or of other grounds upon which an omitted or rejected claim might have been sustained, is a clear violation of the fundamental policy and purpose of the doctrines of res judicata and collateral attack.' Freeman on Judgments, 5th Ed., Vol. 2, §553, p. 1178."

Further evidence of the finality of the Tax Court decision is shown in cases dealing with attempts by both the sovereign and citizen to get out from under the overall binding determination of said court. The case of *Cook* v. *United States,* 108 F. 2d 804, 806 (5 Cir., 1940) held:

> "The provisions of law concerning the Board show that it is, when appealed to by a taxpayer, to have full and unimpeded authority to redetermine the taxes for the tax year, and its decision is to be final, subject to the review allowed by the Circuit Court of Appeals. The taxpayer who elects to invoke the jurisdiction of the court accepts this consequence."

The Court of Appeals for the Second Circuit in *Elbert* v. *Johnson,* 164 F. 2d 421, 424, *supra,* expresses it even more strongly. There mere resort to the Tax Court concluded the taxpayer.

The scope of this doctrine is also set forth in *Lehigh Valley Trust Co.* v. *United States,* 34 F. Supp. 839 (D. C. East. Pa., 1939). There it appeared that the question was not adjudicated by the Board because the question was never presented. Nevertheless, the order of the Board was final and was considered to have conclusively disposed of all matters even those not litigated.

Is the government equally bound by the Tax Court decision? Happily the answer is yes. Just as the taxpayer could not worm out of his position in the *Cook* case, *supra*, neither may the government. *Ross Bowman*, 17 T.C. 681 (1951), our main brief, 19, 24. In other words the law in action has recognized and applied the principles of equality so universally accepted by our system of jurisprudence.

Before leaving the matter we should like again to refer to the so-called "windfall" argument of the government. It appears that even supporters of our position (5 Tax Law Review, November 1949, pp. 58, 61) fall into the same error.

The argument has been that the taxpayer really lost the case on the merits in the Tax Court and is now trying to preserve a windfall. Nothing could be further from the fact. It has been the taxpayer's position from the beginning that the delay for late filing was completely excusable and should have been so found by the Tax Court, that the Tax Court erred but inasmuch as the error was not too serious from a financial viewpoint, the taxpayer did not appeal. After all no one's character or integrity was besmirched requiring vindication; it was simply a matter of dollars and cents. Had the Tax Court erred in the full amount of the potential penalty, namely the aggregate amount of the penalty determined by the Tax Court and also the amount subsequently and collaterally in issue in this very case, then the taxpayer most assuredly would have appealed to the Circuit Court from such determination. Good trial strategy on the part of the taxpayer in the actual state of the litigation in the Tax Court might have influenced the taxpayer's presentation of its case on the issue of late filing and penalty therefor. In other words realizing perhaps that at most only a portion of the penalty could be imposed, the taxpayer might have re-

frained from presenting its case in full. Had the taxpayer won there would have been no further litigation; if it lost its liability was ceilinged. While we do not ask this Court to say why the taxpayer or for that matter the government did what it did, we do ask that the taxpayer not be prejudiced by statements not based upon fact but mere speculation.

CONCLUSION

Finally, if there should be such a radical departure from Congressional enactments, judicial determinations and administrative practice, may not such change be made only by Congress rather than the courts; but granting perhaps that such change may be made by the courts ought not such action be taken only after a full and complete hearing, for which reason we respectfully seek a rehearing in connection with the order denying our petition for certiorari.

Respectfully submitted,

LEO BRADY,

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Attorneys for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

LEO BRADY,
Counsel for Petitioner.